

Date of Decision: 14th December 1995

CRIMINAL APPEAL NO. 16 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA

and

HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

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Shri P.J. Yagnik, Advocate, for the Appellant

Shri S.T. Dave, Addl. Public Prosecutor, for the Respondent

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CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.

(Date: 14th December 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction passed by the learned Additional Sessions of Surat in Sessions Case No. 141 of 1988 convicting the appellant herein of the offence punishable under sec. 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for brief) and also under sec. 66(1)(b) and sec. 65E of the Bombay Prohibition Act, 1949 (the Prohibition Act for brief) and sentencing him to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for 2 years more is

under challenge in this appeal at the instance of the original accused.

2. It is not necessary to set out in detail the facts giving rise to this appeal. It may be sufficient to note that, while on patrolling duty on 10th February 1988 in the company of the Police Inspector and the Police Sub-Inspector of the Salabatpura Police Station at Surat, Police Head Constable, named, Kaljibhai Bhavjibhai (the complainant for convenience), attached to the very same police station found the appellant suspiciously running away from the scene on seeing the police party. Thereupon the appellant was apprehended. His person was searched and from a matchbox in his possession were found eight pills of what is popularly known as charas. Thereupon the complainant lodged his complaint charging the appellant herein with the offence punishable under sec. 20 of the NDPS Act and also that under sec. 65E of the Prohibition Act. The proceeding arising therefrom ultimately came to be registered as Sessions Case No. 141 of 1988 in the Sessions Court at Surat. The case appears to have been assigned to the learned Additional Sessions Judge for trial and disposal. The case ultimately culminated into the conviction and sentencing of the appellant as aforesaid. The aggrieved appellant has thereupon invoked the appellate jurisdiction of this court by means of this appeal for questioning the correctness of the judgment and order of his conviction and sentence passed by the learned trial Judge.

3. This appeal can be disposed of on the ground based on non-compliance with sec. 102(3) of the Criminal Procedure Code, 1973 (the Cr.P.C. for brief) read with the relevant provisions contained in sec. 52 and sec. 51 of the NDPS Act. In that view of the matter, we have not thought it fit to deal with the other rival submissions urged before us at the time of hearing.

4. Under sec. 52(3) of the NDPS Act, the person arrested and the article seized are required to be forwarded to the officer in-charge of the nearest police station or the officer empowered under sec. 53 thereat without unnecessary delay. Sub-section (4) thereof enjoins a duty upon the authority or the officer to whom any person or article is forwarded inter alia under sub-section (3) to take such measures as may be necessary for the disposal according to law of such person or article. Section 51 thereof provides for applicability of the provisions of the Cr.P.C. inter alia to arrests and seizures under the NDPS Act to the extent they are not inconsistent with those contained in the latter enactment. Section 102(3) of the Cr.P.C. inter alia requires a report of the seizure to be made forthwith by the concerned police officer to the magistrate having jurisdiction. Looking to the aforesaid provisions of law, there is no escape from the conclusion that a police officer acting under sec. 42 of the NDPS Act by effecting

arrest of a person and seizure of an article from such person for the purposes of the Act has to report forthwith to the magistrate having jurisdiction. We are not shown any provision under the NDPS Act inconsistent with sec. 102(3) of the Cr.P.C.

5. In the present case, on search of the person of the appellant some eight pills of charas were found from a matchbox in his possession. The obnoxious article was seized by the police. It appears that the person arrested and the article seized were forwarded to the Salabatpura Police Station in Surat. The officer in-charge of the said police station was required to report the matter to the magistrate as provided in sec. 102(3) of the Cr.P.C.. The record shows that no such report was made by or on behalf of the officer in-charge of the Salabatpura Police Station to the magistrate having jurisdiction in that regard.

6. Rival submissions have been urged before us on the point whether the relevant provisions contained in sec. 102(3) of the Cr.P.C. are directory or mandatory. It is not necessary for us to address ourselves on this point. Assuming in favour of the prosecution that the said provisions are directory, a substantial compliance thereto would certainly be necessary. Non-compliance thereto cannot be equated with any substantial compliance thereof. In that view of the matter, non-compliance of the aforesaid statutory provision contained in sec. 102(3) of the Cr.P.C. would vitiate the trial. We are therefore of the opinion that the impugned judgment and order of conviction and sentence cannot be sustained in law. It has to be quashed and set aside.

7. In the result, this appeal is accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Surat on 3rd December 1988 in Sessions Case No. 141 of 1988 convicting the appellant of the offence punishable under sec. 20(b)(ii) of the NDPS Act and also under sec. 66(1)(b) and sec. 65E of the Prohibition Act and sentencing him to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for 2 years more for the offence punishable under the NDPS Act without passing any separate order of sentence for the offence punishable under the Prohibition Act is quashed and set aside. We are told that the appellant has been in jail since the date of his arrest. He is ordered to be set at liberty if no longer required in any other case. The muddamal may be disposed of according to law.

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